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Nos. 88-515 and 88-525

In The Supreme Court of the United States

OCTOBER TERM, 1988

Sable Communications of California, Inc., Appellant

v.

Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States

Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States, Appellants

v.

Sable Communications of California, Inc.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE AND MOTION FOR LEAVE TO FILE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Morality in Media, Inc. hereby respectfully moves this honorable Court, pursuant to Court Rule 36.3, for leave to file the attached brief amicus curiae in support of the Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States. The consent of the attorney for the Government has been granted, a copy of which is being filed with this Court concurrently with this motion and brief. The consent of the attorney for Sable Communications of California, Inc. was requested but refused.

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States.

This organization is now national in scope, and its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, 120 note 4

(1973) and in Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 58, notes 7 and 8 (1973).

More recently Morality In Media participated as Amicus in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978); New York v. Ferber, 458 U. S. 747 (1982), Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985), and in the consolidated cases Fort Wayne Books, Inc. v. Indiana (87-470) and Sappenfield v. Indiana (87-614).

Amicus submitted Comments in the first rulemaking proceedings by the F.C.C. on the issue of "appropriate regulation" in order to restrict access to "dial-a-porn" services to adults only; and, in July 1984, Amicus filed a Petition For Reconsideration with the Commission,

alleging that the regulation issued, 47 C.F.R. §64.201, was ineffective and would in effect reward dial-a-porn services with immunity for following ineffective rules. Amicus also filed an amicus brief in the case of Carlin Communications, Inc. v. F.C.C., 749 F.2d 113 (2nd Cir. 1984), asking the court to hold that the F.C.C. regulation in question, 47 C.F.R. §64.201, was unconstitutional.

In 1985, Amicus submitted Reply Comments in the Commission's second rulemaking proceedings, arguing that the creation of an effective plan to limit access to adults only was highly unlikely given the nature of the telephone system.

Amicus has supported Congressional effort's to amend 47 U.S.C. 223(b) in order to do away with its "safe harbor"

for obscene or indecent commercial communications and in 1988 was mentioned during the Congressional floor debate on the dial-a-porn amendment as being a National organization supporting it.

Morality in Media, Inc. files this motion and brief supporting the position of the Government because it believes that the decision in this matter will be of grave importance to all persons in the United States, especially children and their parents. Amicus believes that its brief contains arguments in support of its contention, that indecent commercial "dial-it" messages are outside First Amendment protection, which will not be advanced by the parties.

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SUMMARY OF ARGUMENT

Morality In Media contends that recognizing and classifying indecent communications for commercial purposes, by telephone, as a category of material outside the protection of the First Amendment, is supported by this Court's previous decisions, since the evil to be restricted here so overwhelmingly outweighs the expressive interests, if any, at stake.

"Indecency" is a standard separate and apart from obscenity. As this Court noted in F.C.C v. Pacifica Foundation, 438 U.S. 726 (1978):

> "Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."

The definition of indecency is grounded in the concept of "patent offensiveness." Indecent words offend

"for the same reason that obscenity offends" and are "of such slight social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." The Court in F.C.C. v. Pacifica Foundation stated that some uses of even the most offensive words are protected, but did not say that broadcast indecency is protected speech.

This honorable Court has recognized that the government may punish the use of words because of the "vulgar," "lewd," and "plainly offensive" character of the speech, apart from any propensity of the words to provoke violence or disorder. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) (the concept of present injury); Hess v. Indiana, 414 U.S. 105 (1973) (privacy interests invaded); and F.C.C. v. Pacifica, 438

U.S. 726 (1978) (importance of content and context in First Amendment analysis).

In New York v. Ferber, 458 U.S. 747 (1982), the Court classified child pornography as a category of material outside First Amendment protection because the evil to be restricted so overwhelmingly outweighed the expressive interests, if any, at stake.

Amicus contends that the prohibition in 47 U.S.C. 223(b) on indecent communication for commercial purposes, by telephone, should be upheld as a Constitutional regulation of material outside First Amendment protection because the evil of "dial-a-porn" also so overwhelmingly outweighs the expressive interests, if any, at stake.

Section 223(b)'s prohibition on indecent communication is a content-based classification, but the provision is not

"viewpoint-based," does not prohibit discussion of an entire topic, does not pronibit "political speecn," and does not suppress speech in a "public forum." Further, indecency has the same place in the "hierarchy of First Amendment Values" as obscenity.

So, too the evil to be restricted is overwhelming. Various of the governmental interests spelled out in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) to justify obscenity legislation, also justify the proscription on indecent dial-a-porn. The problem of dial-a-porn also implicates the government's interest in protecting the well-being and privacy of the home--an interest this honorable Court has described as being "of the highest order in a free and civilized society." Frisby v. Schultz, 56 LW 4785 (6/27/88) Further, the dial-a-porn problem implicates the government's

interest in "safeguarding the physical and psychological well-being of minors"--an interest the Court has identified as being "compelling."

Amicus also contends that it is not Butler v. Michigan's "harmful to minors" standard that applys to "dial-it" services, but rather Pacifica's indecency standard. Butler v. Michigan, 352 U.S. 380 (1957) is properly read to require that in any situation where one can effectively differentiate between minors and adults, a harmful to minors standard cannot be applied to adults and children alike. It does not, however, prevent the use of a different standard that is distinct from a "harmful to minors" test --namely, "indecency"--when such a differentiation cannot effectively be made or when different governmental interests are at stake. Unlike the "harmful to

minors" standard, which is specifically aimed at protecting minors from material harmful to them, the "indecency" standard is determined for a mixed audience of both children and adults.

Last, Amicus contends that the Court's summary affirmance in Wilkinson v. Jones, 107 S.Ct. 1559 (1987) (invalidating the Utah Cable Television Programming Indecency Act) does not foreclose the Court from now addressing the question of whether the First Amendment denies Congress power to prohibit indecency in an entirely different medium--to wit, telephonic communication, and in particular, "dial-it" services.

ARGUMENT

I. RECOGNIZING AND CLASSIFYING "INDECENT" TELEPHONE MESSAGES FOR COMMERCIAL PURPOSES AS A CATEGORY OF MATERIAL OUTSIDE FIRST AMENDMENT PROTECTION IS NOT INCOMPATIBLE WITH THIS COURT'S PREVIOUS DECISIONS.

A. "Indecency" Is A Legal Standard Separate And Apart From Obscenity

As amended in 1988, 47 U.S.C. 223(b) includes an absolute prohibition on both obscene or "indecent" telephone messages for commercial purposes, irrespective of whether the message is made to an adult or to a minor. Section 223(b)(1)(A) now reads:

> "[(b)(1) Whoever knowingly--] (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed

the call; or"[1]

It is Congress' right to maintain the decency as well as the "chasteness" of interstate channels of communication in order that those channels not become the means of spreading evil that justifies this regulation. As the Court noted in United States v. Orito, 413 U.S. 139, at 144 (1973):

> "[C]ongress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promotion or spreading evil, whether of a physical, economic or moral nature."

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1. The pronibition in Section 223(a)(1)(A), which existed prior to enactment of Section 223(b), also proscribes "indecent" communication. Section 223(a)(1)(A) contains the words "obscene, lewd, lascivious, filthy, or indecent." These words are in the disjunctive which, according to the authority of F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), implies a separate meaning for each. Cf., Hott v. State, 400 N.E. 2d 206 (Ind. Ct. App. 1980), trans. den., 409 N.E. 2d 1082 (Ind. Sup. Ct. 1980), cert. den., 449 U.S. 1132 (1981); United States v. Darsey, 431 F.2d 963 (5th Cir. 1970).

Indecency is a legal standard that is separate and apart from obscenity. In F.C.C. v. Pacifica foundation, 438 U.S. 726 [hereinafter, "Pacifica"], this Court defined the term "indecent" with reference to 18 U.S.C. 1464, and rejected the claim that the broadcast of Carlin's monologue was not "indecent" because of the absence of prurient appeal:

> "Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality."[2](emphasis supplied)

At several points in its Pacifica opinion, the Court also described "indecent" material as being "patently offensive." For example, the Court states at 438 U.S. 745:

> "The question in this case is whether a broadcast of patently offensive words dealing with sex and

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2. Pacifica, at 740.

excretion may be regulated because of its content." (emphasis supplied)

Clearly, the definition of "indecent" is grounded upon the concept of "patent offensiveness." As the Pacifica Court noted,[3] Justice Harlan equated "indecency" with the concept of "patent offensiveness" when he literally substituted "indecency" for "patent offensiveness:"

> "These magazines cannot be deemed so offensive as to affront current community standards of decency--a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.'"[4]

B. This Court's Pacifica Decision Does Not Treat Broadcast "Indecency" As Protected Speech

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3. Id., at 740, n. 15.

4. Manual Enterprises, Inc. v. Day, 370 U.S. 478, at 482 (1962), cited with approval in Hamling v. United States, 418 U.S. 87, at 112 (1974).

The fact that society might find speech offensive is not in itself necessarily a sufficient reason for suppressing it. As Pacifica points out, if it is the speaker's opinion or point of view that gives offense, First Amendment protection might be required.[5] In Pacifica, however, the words at issue gave offense "for the same reason that obscenity offends,"[6] and their place in the "hierarchy of First Amendment values"[7] was aptly described in Pacifica at 438 U.S. 746:

> "'Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampsnire, 315

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5. Pacifica, at 746.

6. Id.

7. Id.

U.S. 568, 572."

The Court states further at 438 U.S. 743, n. 18:

> "A requirement that indecent language be avoided will have its primary effect on form, rather than the content of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[8]

Undoubtedly, as Pacifica states,[9] some uses of even the most offensive words are protected [See, e.g., Hess v. Indiana, 414 U.S. 105 (1973)], but in "assum[ing], arguendo, that [the Carlin] monologue

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8. In Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159, at 3164-3165 (1986) (upholding a school district's authority to prohibit an indecent speech in a school assembly), the Court was also careful to point out that the prohibition was on the "form" or "mode" of expression. Cf., Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 83-84 (1983) (Stevens, J., concurring); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, at 546-548 (1980) (Stevens, J., concurring).

9. Pacifica, at 746.

would be protected in other contexts"[10] (emphasis supplied), the Court did not say that the FCC must provide a time of day when the monologue could be broadcast[11] and certainly did not say that indecency in the broadcast medium is protected

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10. Id.

11. In fact the Court said in a footnote (Pacifica, at 750, n. 28): "[W]hether broadcast audiences in the late evening hours contain so few children that playing this monologue would be permissible is an issue neither the Commission not this Court has decided."

speech.[12]

The Court distinguished the Carlin monologue as broadcast from the offensive words emblazoned on a jacket, at issue in Cohen v. California, 403 U.S. 15 (1971), and the nudity depicted on drive-in movie theatre screen, at issue in Erznoznik v. City of Jacksonville, 422 U.S. 205

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12. The three judge plurality opinion in Pacifica is the Court opinion and the only one that is precedential. In Marks v. United States, 430 U.S. 188 (1977), the Court said that the three judge plurality opinion in Memoirs v. Massachusetts, 383 U.S. 413 (1966) constituted the "holding of the Court and provided the governing standards," since it was the plurality opinion in Memoirs which constituted "the position taken by those members who concurred in the judgment on the narrowest grounds." The Supreme Court has generally regarded the narrowest ground as the rationale offered in support of the result that would affect and control the fewest cases in the future. Cf. Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Col. L. Rev. 756 (1980).

The Pacifica Court reviewed only the Commission's holding that the Carlin monologue "as broadcast was indecent and prohibited by 18 U.S.C. 1461." Id. at 732, 734-735.

(1975).[13] Noting that each "medium of expression presents special First Amendment problems,"[14] the Pacifica Court concluded that two characteristics of the broadcast medium justified special treatment of indecent broadcast:

> 1. Its pervasive presence in the lives of all Americans and the fact that it confronts the citizen not only in public but also in the privacy of the home, where the right of the individual to be left alone outweighs any First Amendment right of the intruder.
> 2. The ease with which children may obtain access to it.[15]

As to the latter characteristic, the

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13. Pacifica, at 747, n. 25; 749 (and n. 27). The Court in Pacifica did not analyze the prohibition on indecent broadcast in 18 U.S.C. 1464 as a time, place and manner restriction, as it did the zoning regulation in Young v. American Mini Theatres, 427 U.S. 50 (1976); nor did it subject the prohibition to the "critical scrutiny" it demanded in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (involving speech "at the heart of the First Amendment's protection").

14. Pacifica, at 748.

15. Id., at 748-749.

Court went on to reject the argument that the prohibition on broadcast indecency reduced adults to hearing only what is fit for children, pointing out that adults could still attend a night club or purchase a tape if they wanted to hear the words.[16] So too, the Court recognized that a broadcast radio station, unlike an "adult" bookstore or movie theatre, cannot be effectively regulated in order to protect minors, without restricting expression at its source.[17]

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16. Id., at 750, n. 28.

17. Id., at 749.

C. Indecent Speech May Be Punished Regardless Of Any Tendency To Provoke Violence Or Disorder Among The Hearers

This honorable Court has long recognized that the right to speak is not absolute at all times and under all circumstances. In Chaplinsky v. New Hampshire 315 U.S. 568, 571-572 (1941), the Court stated:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting, or 'fighting words'--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (footnotes omitted)(citing, inter alia, Chafee, Free Speech in the United States, p. 149-150 (1941)). (emphasis supplied)

The concept of "present injury" formed in part the basis of Chafee's "Normal Criminal Law of Words:"

> "But the law also punishes a few classes of words like obscenity, profanity, and gross libels upon individuals, because the very utterance of such words is considered to inflict a present injury upon listeners, readers, or those defamed, or else to render highly probable an immediate breach of the peace.
>
> [T]hese verbal peace time crimes...are too well-recognized to question their constitutionality, but I believe that if they are properly limited, they fall outside the protection of the free speech clauses.... ...The true explanation...is that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see."[18] (emphasis supplied)

So too, the Model Penal Code, Section 250.2 (Proposed Official Draft 1962)

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18. Chafee, Free Speech in the United States, p. 149-150 (1942).

prohibits "offensively coarse utterances," rejecting the notion that words may only be punished if they provoke violence:

> "Coarse or indecent language is penalized under clause (b) regardless of any actual or presumed tendency to evoke disorder among the hearers, since the interest we seek to protect is freedom from present nuisance rather than freedom from anticipated violence. The concept of present injury is the basis on which, Chafee rested the 'Normal Criminal Law of Words,'.... A rule that words may be punished only if they tend to provoke violence would give immunity to disgusting public verbal behavior merely because the unwilling audience comprised only persons too timid, weak, or well-behaved to respond with disorderly violence."[19]

In Rosenfeld v. New Jersey, 408 U.S. 901 (1972), a memorandum case in which a defendant used concededly filthy language during a public school board meeting in New Jersey, three Justices of this Court, writing in dissent, stressed the "grossly

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19. Model Penal Code, Tentative Draft 13, at 7 (1961).

offensive and emotionally disturbing"

nature of the speech involved:

> "But the exception to First Amendment protection recognized in Chaplinsky is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence.
> ....
> I agree with th[e] view that a verbal asssault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance.
> The Model Penal Code...also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within the protection of the First Amendment. See Model Penal Code §250.2(1)(a) and (b). (Proposed Official Draft 1962)."[20] (emphasis supplied)

In Hess v. Indiana, 414 U.S. 105, at 107-108 (1973), this Court recognized that

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20. Id., at 905-906. See also, Plummer v. City of Columbus, 414 U.S. 3, at 4 (1973) (Powell, J., dissenting).

some words which do not amount to "fighting words" but which do intrude upon the privacy rights of others in an essentially intolerable manner are outside the protection of the First Amendment:

> "Indiana's disorderly conduct statute was applied in this case to punish only spoken words. It hardly needs repeating that 'the constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech."' ...In the first place, it is clear that the Indiana court specifically abjured any suggestion that Hess' words could be punished as obscene.... ...By the same token, any suggestion that Hess' speech amounted to 'fighting words,'...could not withstand scrutiny. ...In addition, there was no evidence to indicate Hess'speech amounted to a public nuisance in that privacy interests were being invaded. 'The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is...dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.' Cohen v. California, supra, at

21.[21]

In F.C.C. v. Pacifica Foundation, this Court again recognized that both the content and context of speech are critical elements of First Amendment analysis.[22] In its analysis of content, the Court focused on three characteristics of the Carlin monologue: the offensiveness of the words used and their limited speech value,[23] and the harmful effect of such words:

> "The Commission stated: 'Obnoxious, gutter language describing these matters has the effect of debasing and brutilizing human beings by reducing them to

21. Cf., Kovacs v. Cooper, 336 U.S. 77, at 87, 89 (1949) ("In his home...he is practically helpless to escape this interference with his privacy by loud speakers.... That more people may be more easily and cheaply reached by sound trucks,...is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance...."). (emphasis supplied)

22. Pacifica, at 744.

23. See infra at 11-12.

their mere bodily functions....' 56 F.C.C. 2d, at 98. Our society has a tradition of peforming certain bodily functions in private, and of severly limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure."[24] (emphasis supplied)

The Court continues at 438 U.S. 746:

"Such utterances...are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (emphasis supplied)

And, at 438 U.S. 748-749, the Court said:

"To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an

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24. Pacifica, at 746, n. 23. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, at 63 (1973), the Court stated that experience affords an ample basis for legislatures to conclude that "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex."

> assault is to run away from the blow. One may hang up on an indecent phone call, but that option does not give the caller a Constitutional immunity or avoid a harm that has already taken place."

As noted previously,[26] the Pacifica Court found two characteristics of the broadcast media to be crucial on the issue of context: the pervasive nature of the medium, confronting the citizen not only in public but also intruding into the privacy of the home and its accessibility to children. Clearly, the Court in Pacifica was concerned about preventing exposure of indecent broadcast to adults, especially in the privacy of the home, and about the harmful effect that a minor's exposure to indecent broadcast might entail, in any location.

The Court's decision in Bethel School District No. 403 v. Fraser, 106 S.Ct.

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26. See infra at 15.

3159, did not rest upon a finding that the student's speech in a school assembly had any "propensity" to "materially disrupt" classwork, but rather on the "vulgar," "lewd" and "plainly offensive" character of the speech.[27] Further, the Court in Bethel did not say that the school district must provide a place in a school setting and a time during the school day, or after school hours, when the student would be permitted to present his "offensively lewd and indecent speech" to

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27. In Hazelwood School District v. Kuhlmeier, 56 LW 4079, at 4082 (1/13/88) (upholding a high school principle's decision to delete two articles from a school newspaper), the Court stated that a school may disassociate itself not only from speech that would "materially disrupt classwork or involve substantial disorder or invasion of the rights of others," but also from speech "that is, for example, ... vulgar, or profane or unsuitable for immature audiences." The Court noted that its decision in Bethel did not rest upon any finding that the speech had any "propensity" to "materially disrupt" classwork, but rather on the "vulgar," "lewd," and "plainly offensive" character of the speech. Kuhlmeier, at 4082, n. 4.

the student body.[28]

In Hustler Magazine, Inc. v. Falwell, 56 LW 4180, (2/24/88) the Court noted that the oft-repeated First amendment principle that the public expression of ideas cannot be prohibited simply because some hearers find the ideas offensive is, like other priniciples, "subject to limitations."[29]

The Court then said:

> "We recognized in Pacifica Foundation, that speech that is 'vulgar,' 'offensive' and 'shocking' is 'not entitled to absolute constitutional protection under all circumstances.' 438 U.S., at 747. In Chaplinsky v. New Hampshire... we held that a state could lawfully punish an individual for the use of insulting '"fighting" words--those which by their very nature inflict injury or tend to incite an immediate

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28. In the regard, compare the Court's treatment of the zoning ordinance in City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986) and the picketing ordinance in Boos v. Barry, 56 LW 4254 (3/22/88) (content-based restriction on political speech in a public forum).

29. Id., at 4182.

breach of the peace.' ...These limitations are but recognition of the observation...that this Court has 'long recognized that not all speech if of equal First Amendment importance.'"

D. Classifying Section 223(b)'s Indecent Commercial Communications, By Telephone, As A Category Of Material Outside First Amendment Protection Is Justified Because The Evil To Be Restricted So Overwhelmingly Outweighs The Expressive Interests If Any At Stake

In New York v. Ferber, 458 U.S. 747, at 763 (1982), this Court noted that "recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."

The Court continues at 458 U.S. 763-764:

"It is not rare that a content-based classification of speech has been accepted because it may be

appropriately generalized that within the confines of the given classification the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjucation is required."

Recognizing and classifying indecent telephonic communications for commerical purposes as a category of material outside the protection of the First Amendment is also not incompatible with this Court's previous decisions, since the evil to be restricted here also so overwhelmingly outweighs the expressive interests at stake.

While the indecency prohibition in 47 U.S.C. 223(b) is a content-based classification, the provision is not "viewpoint-based,"30 does not prohibit

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30. Cf., Boos v. Barry, 56 L.W. 4255, 4256 (3/22/88)

public discussion of an entire topic,[31] does not pronibit "political speech,"[32] and does not attempt to suppress speech in

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31. Cf., Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, at 537-540. Section 223(b)'s prohibition on indecent communication does not, for example, prohibit "frank talk" about sex. The statute is aimed at the patently offensive manner of expression, not subject matter.

32. Cf., Boos v. Barry, at 4257.

a "public forum."[33] Rather, the indecency prohibition in Section 223(b) is on the form or mode of the speakers communication, and, as this Court has been careful to point out in its previous decisions upholding restrictions on "indecent" communication, a requirement that "indecent" language be avoided has

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33. A private telephone company's status as a public utility doesn't convert its "dial-it" network into a public forum. See, Carlin Communications, Inc. v. Mountain States Telephone, 827 F.2d 1291 (9th Cir. 1987), cert. den., 108 S.Ct. 1586 (1988) and Carlin Communications, Inc. v. Southern Bell, 802 F.2d 1352 (11th Cir. 1986), both upholding a private phone company's right to exclude dial-a-porn messages from its 976 network. As noted in Perry Education Assn. v. Perry Local Educator's Assn., 460 U.S. 37, at 49, n. 9 (1983): "[T]ne mere fact that an instrumentality is used for the communication of ideas does not make a public forum."

Further, the vast majority of telephones are private property and are located on private property. Cf., Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 77-78 (1983) (Rennquist, J., concurring) ("Because the home mailbox has features which distinguish it from a public hall or public park, ... it cannot be totally assimilated for purposes of analysis with these traditional public forums.").

little or no effect on serious communication.[34]

Further, this Court has held that society's interest in protecting erotic materials is of a "wholly different, and lesser, magnitude,"[35] that commercial speech involving no matters of public concern has "reduced constitutional value,"[36] and, that "indecent" utterances have the same place in the "hierarchy of First Amendment values"[37] as obscenity. Dial-a-porn is indeed crass commercial

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34. For example, in Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159, 3164, the Court noted that a prohibition on the use of indecent language in Congress had not in the least dampened the vigour of political debate in that esteemed institution.

35. Young v. American Mini Theatres, 427 U.S. 50, at 70 (1976).

36. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 479, 761 (1985).

37. See infra p. 11.

exploitation of sex.[38] It's subject matter is (or ought to be) intensely private.[39] Its offensiveness is attested to by the public outcry that arose not long after the industry's inception[40] and

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38. See infra, n. 24.

39. See infra p. 23.

40. On December 20, 1983, the Federal Communications Commission issued a Further Notice of Inquiry and Notice of Proposed Rule Making to afford interested parties an opportunity to comment on the Congressional amendment to Section 223, requiring the FCC to regulate dial-a-porn so as to restrict access to adults only. As reported in a February 19, 1984 New York Times Article:

> "[M]ore than 25,000 [people] have let the Federal Communications Commission know what they think about telephone sex services, known generally as 'Dial-a-Porn'....
>
> The Commission asked for public comment last December. But no one at the agency predicted the deluge of mail received in response.
>
> The letters, stacked in boxes for review by agency attorney's, came from all parts of the country. ...Most of them are written by mothers. And their message is virtually uniform: Do not try to regulate 'Dial-a-Porn' services; ban them."

which has continued unabated.[41]

So too, the evil to be restricted overwhelmingly outweighs the expressive interests, if any, at stake in the regulation of "indecent" dial-a-porn. As noted at the outset, Congress may regulate the channels of interstate commerce in order that those channels will not become the means of spreading evil, of a physical, moral or economic nature. Various of the governmental interests spelled out by the Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49, to justify obscenity legislation, also justify the proscription on indecent dial-a-porn. These include the social

41. See, e.g., Carlin Communications v. Mountain States Telephone, 827 F.2d at 1293 ("Community reaction to Carlin's message was strongly adverse. School officials complained about children calling Carlin's number, newspaper editorials chastised Mountain Bell for profiting from such entertainment....").

interest in order and morality,[42] the quality of life and total community environment, and, very likely, the public safety itself. Mr. Chief Justice Burger best summed it up when he said "There is a right of the Nation and of the States to maintain a decent society."[43]

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42. It is axiomatic that legislation may be based on health, safety, welfare or morals. In Bowers v. Hardwick, 106 S.Ct. 2841, at 2846 (1986), this Court stated that the law is "constantly based on notions of morality." Cf., Roth v. United States, 354 U.S. 476, at 502 (1957), where Justice Harlan, concurring, said:

> "[E]ven assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of material, the essential character of which is to degrade sex, will have an eroding effect on moral standards."

43. Paris Adult Theatre I, 413 U.S. at 59-60. See also, Rosenfeld v. New Jersey, 408 U.S. at 902, (Burger, J., dissenting) ("If continued, this permissiveness will tend further to erode public confidence in the law—that suble but indispensible ingredient of ordered liberty.")

Prior decisions of this Court have also remarked on the unique nature of the nome. For example, in Frisby v. Schultz, 56 LW 4785, at 4788 (6/27/88) the Court stated:

> "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.
> ....
> ...A special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that government may protect this freedom. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726, 748-749 (1978)...."

With the advent of the commercial "dial-it" industry, pornographers for the first time in the history of the United States, obtained direct and uninvited access to virtually every home in the nation. In 1983 Congress attempted to

regulate dial-a-porn on the mistaken notion that such "expression" was protected by the First Amendment. Congress failed and today hardcore explicit sex is just a "dial-away" for every man, woman, and child who has access to a phone. Just as adults are entitled to walk down a public street without the necessity of having to avert their eyes (or their children's eyes) to avoid a public "nude performance," and to send their children to a public school without the necessity of exposing them to an offensively lewd and indecent speech in a school assembly, they are also entitled to turn a TV, radio, or telephone dial in the privacy of the home, or leave their children freedom to do so, without subjecting themselves or their children to viewing intrusive nudity or explicit sex,

or hearing descriptions of the same.[44]

Further, as this Court stated in its New York v. Ferber decision, at 458 U.S. 756-757:

> "It is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of minors' is 'compelling.' ...In Ginsberg v. New York, 390 U.S. 629 (1968), we sustained a New York ["harmful to minors"] law protecting children from exposure to nonobscene literature. Most recently, we held that the government's interest in the

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44. The Pacifica Court was evidently very concerned about the impact of broadcast indecency on the unwilling or unsuspecting adult. Many, if not most, adults who are frequent users of pornographic material (which includes dial-a-porn), however, become addicted to it, and it is misleading to describe their use of it as "willing." Further, as noted above, governmental concerns other than exposure of indecent matter to unwilling adults and minors are at stake. These valid governmental concerns are immeasurably amplified when the medium of expression is pervasive and confronts the citizen not only in public but in the privacy of the home. Cf., Paris Adult Theatre, 413 U.S. at 57 (no concept of "consenting adults" applicable); United States v. Orito, 413 U.S. at 143 ("That the transporter has the abstract proprietary power to shield ... all others ... is not controlling.")

'well-being of its youth' justified special treatment of indecent broadcasting received by adults as well as children. FCC v. Pacifica Foundation...."

The Ferber decision did not involve the interests of adults in the privacy of the home, and its reference to Pacifica cannot be read as disavowing any governmental interest in shielding adult viewers from broadcast indecency. The Pacifica Court was clearly concerned about the impact of indecent broadcast on both adults and children, and this Court's decision in Frisby v. Schultz[45] is the clearest indication that this Court has not "disavowed" the governmental interest in protecting the privacy of the home.[46]

What the Court in Pacifica did indicate, and what this Court in Ferber

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45. See infra at 35.

46. See also, Bolger v. Youngs Drug Products Corp., 463 U.S. at 77-78, (Rehnquist, J., concurring).

affirms, is that the ease with which children may obtain access to broadcast material, coupled with the government's compelling interest in the well-being of youth and in supporting parental authority in the home, could itself justify Congress' special treatment of indecent broadcasting. While so-called "adult" bookstores, theatres and other similar establishments can keep minors out without denying access to adults, a physical separation of the broadcast audience is impossible.

A physical separation of the "dial-it" audience is also impossible, and the compelling governmental interest in protecting youth and in supporting parents could itself justify the statutory ban on indecent "dial-it" messages, even though some presumably "willing" adults are also in the audience.

II. NOT BUTLER'S "HARMFUL TO MINORS" STANDARD BUT RATHER PACIFICA'S INDECENCY STANDARD APPLYS TO "DIAL-IT" SERVICES

The reasoning of this Court in upholding use of the indecency standard for radio broadcasts is applicable to commercial "dial-it" services. It is not the speakers opinion or point of view about sexual matters that is the target of 47 U.S.C. 223(b)'s pronibition on indecent commercial telephone messages. No, the words that the federal dial-a-porn statute proscribes offend for the "same reason that obscenity offends," are "no essential part of any exposition of ideas," and are of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

The effect of enforcing Section 223(b)'s prohibition on indecent "dial-a-porn" will be on the form, rather than content, of serious communication and only then if the words used are so offensive as to affront current community standards. The prohibition in Section 223(b) is, therefore, clearly distinguisnable from tne statutory ban on contraceptive advertisements invalidated by this Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). In Bolger tne Court found tnat tne particular advertisements for contraceptives conveyed truthful information relevant to important social issues and bearing on parents' ability to discuss sexual matters with tneir cnildren.[47]

Telephonic communications, like tne

47. Id., at 69, 74-75.

broadcast media, have established a pervasive presence in the life of the American people. A telephone and a radio or television can be found in almost every nome. Telephones are also found in the work place, retail establisnments, restaurants, theatres, and the like, as well public transportation facilities and on busy street corners. With the advent of the wireless, portable telepnone, phones are also now found in cars, airplanes, and, increasingly, brief cases. With the advent of the so-called "976 network," thousands of individuals can now simultaneously listen to the same

recorded message.[48] Some phone systems now even permit the caller to see the person they are calling.

Commercial "dial-it" services have unimpeded access to almost every telephone receiver, and, just as patently offensive, indecent material broadcast over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, such material transmitted via telephone lines (and often without) also confronts the citizen not

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48. In Carlin Communications v. Mountain States Telephone, 827 F.2d 1291 (1987), cert. den., 108 U.S. 1586 (1988), the Ninth Circuit Court of Appeals questioned whether the Arizona public utility law was applicable to Bell's 976 network. The Court reasoned that since over 7,900 persons can simultaneously listen to the same message on a 976 network, the telephone "is serving as a medium by which Carlin broadcasts its messages. The phone company resembles less a common carrier than it does a small radio station." Id., at 1294. As reported in the February 12, 1989 issue of Newsday (at p. 77), FDR Interactive Technologies, a division of American Express, announced "a way to handle up to 30,000 simultaneous phone calls."

only in public but also in the privacy of the home.

While it is true that telephone users do not normally call telephone numbers on a random basis, as a broadcast audience may scan radio frequencies or TV channels, telephone users do frequently dial the wrong number and may also call "dial it" services without knowing the exact nature of the service called, just as the broadcast audience may tune in on a particular program without fully appreciating what they might be subjecting themselves to. While the careless, curious, or susceptible in the marketplace may have to proceed at their own risk, a man or woman in the privacy of his or her own home should not have to do so.

The ease with which children obtain access to "dial-it" services is well

documented.[49] Children access such services by mistake, out of curiosity, through peer pressure, for the "fun of it," and because of addiction. Unlike the mails which arrive once during the day and usually at a set time, "dial-it" services, like radio or TV broadcast, are accessible twenty-four hours-a-day, inside the home and out, and do not arrive in a sealed

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49. After reporting a story about a 15 year old boy who ran up a phone bill of $5,312 for calls to a "976 number that offered sexually explicit conversation," Los Angeles Times staff writer Kim Murphy, in a September 28, 1987 article, wrote the following about the "dial-a-message industry:"

> "Federal regulators say they are only now coming to grips with a technology that many now acknowledge was available in living rooms across America before anyone knew quite what it was.
>
> 'I think it got out of control for a while,' said Susan West, a Federal Communications Commission analyst....
>
> 'I really can't believe that there's...a kid in this country who hasn't called one of these lines by now, and I think we've heard from everyone of their parents. We just have gotten hundreds of thousands of letters and phone calls about it. People are upset,' she said."

envelope or require an ability to read.

Nor will the prohibition in Section 223(b) against indecent commercial communications by telephone reduce adults to receiving only those materials that are fit for minors. Adults will still be able to attend a nightclub or theatre or purchase tapes, videos, or reading materials if they want to hear or read these words. Butler v. Michigan, 352 U.S. 380 (1957) concerned a statute imposing a statewide prohibition on the dissemination of material (the printed word, pictorial matter, "recordings," things) "manifestly tending to the corruption of youth"--i.e., harmful to minors. On that issue, that Court said at 352 U.S. 383:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population...to

reading only what is fit for children."

Butler is also properly read to require that, in any situation where one can effectively differentiate between minors and adults, a "harmful to minors" standard cannot be applied to adults and children alike. It does not, however, prevent the use of a completely different standard that is distinct from a "harmful to minors" test--namely, "indecency"--either when such a differentiation cannot be made or where the governmental concerns are distinct from those supporting application of the "harmful to minors" test.

"Dial-it" services, like the broadcast media, cannot reasonably differentiate between adults and minors, since it is impossible to prevent minors from calling these services as structured. At present, any man, woman or child can

pick up a telephone and obtain access to a wide variety of "dial-a-porn" services, and Pacifica did not place on parents the onus of taking extraordinary precautions to protect their children either in public or in the privacy of the home.[50]

There is another reason why application of the indecency standard--whether to the broadcast medium, a public school assembly, the halls of Congress, or commerical telephonic communications--does not reduce adults to reading, seeing or hearing that which is fit for children. Unlike the "harmful to minors" standard, which is specifically aimed at protecting minors from material

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50. Technology was available prior to the Court's decision in Pacifica which in theory would have enabled parents to block offensive programming in the home. See, e.g., Brief for Respondent Pacifica Foundation at 49, n. 40, F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), where such technology was described.

harmful to them, the "indecency" standard is an "Indecent For All" standard and is determined for a mixed audience of both children and adults.

This Court in Pacifica, in upholding a statutory prohibition on indecency in the broadcast medium, was clearly concerned with protecting both adults and children. The Court likened the impact of an indecent broadcast upon adults to a physical assault.[51]

In Bethel School District No. 403 v. Fraser, 106 S.Ct. at 3164-3165, the Court, after noting that members of Congress were prohibited from using "indecent language against the proceedings of the House," stated that the "pervasive sexual innuendo" in the student's speech was:

"Plainly offensive to both

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51. Pacifica, at 748-749.

> teachers and students--indeed to any mature person." (emphasis supplied).

The Bethel Court's focus was not "prurient appeal for minors" but rather the inculcation of habits and manners of civility--suitable not "for a sandbox," but rather necessary to the maintenance of a democratic political society:

> "The role and purpose of the American public school system was well described by two historians, saying, 'public education must prepare pupils for citizenship in the Republic.... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.' ...[W]e echoed the essence of this statement of the objectives of public education as the 'inculca[tion of] fundamental values necessary to the maintenance of a democratic political system.' ...[T]hese 'fundamental values' must take into account consideration of the sensibilities of others,.... The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's

countervailing interest in teaching students the boundaries of socially appropriate behavior."[52] (emphasis supplied)

Accessibility by minors to dial-a-porn services was a primary concern to Congress in the adoption of the current version of Section 223(b). NotButler v. Michigan's "harmful to minors" standard, however, but rather Pacifica's indecency standard applies to the "dial-it" industry. The Pacifica Court rejected the argument that the use of an indecency standard in the broadcast medium violated Butler, and the rationale of Pacifica clearly applies to "dial-it" services.

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52. Id., at 3164. Nor is regulation of the kind of public nudity traditionally subject to indecent exposure laws justified on the sole basis that such nudity may harm minors. Cf., Erznoznick v. City of Jacksonville, 422 U.S. 205 at 211, n.7 (1975); State v. Baysinger, 97 N.E.2d 580 (Ind. Sup. Ct. 1979), appeals denied sub nom. Clark v. State, 446 U.S. 931 (1980) and Dove v. State, 449 U.S. 806 (1980).

III. THIS COURT'S DECISION IN WILKINSON V. JONES DOES NOT BAR GOVERNMENT REGULATION OF INDECENT DIAL-A-PORN

In Wilkinson v. Jones, 107 S.Ct. 1559 (3/23/87), this Court summarily affirmed witnout opinion a decision of tne Tenth Circuit Court of Appeals[53] invalidating tne Utan Cable Television Programmng Decency Act. Cnief Justice Rennquist and Justice O'Connor noted probable Jurisdiction and voted to set the case down for oral argument. Tne Court of Appeals in a brief per curiam opinion nad affirmed the decision of tne United States Supreme Court for the District of Utan,[54] basing its affirmance "on the basis of the reasons stated in the [District Court] opinion." Circuit Judge Baldock, wno agreed that tne Utan law was vague and

53. Wilkinson v. Community Television, 800 F.2d 989 (10tn Cir. 1986).

54. Community Television v. Wilkinson, 611 F. Supp. 1099 (D.C. Utan (1985).

overbroad, wrote a lengthy concurring opinion supporting his conclusion that "the Pacifica rationale for the regulation of indecency applies to cablecasting."[55]

The opinion of the District Court, relied on by the Tenth Circuit, held that the Utah Cable Television Programming Decency Act was both unconstitutionally overbroad and vague and that the Utah statute was preempted. While dicta or loose language in the District Court's opinion has prompted some to assert that the court's decision rests on a determination that the First Amendment prevents government prohibitions on all non-obscene cable TV programming, language in the opinion indicates that a more narrowly drawn and specifically delineated statute could have been found

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55. Wilkinson, 800 F.2d at 1006.

constitutional. Clearly, the District Court decision could rest on various grounds and should not be read as establishing the broadest possible constitutional principle.

An examination of the Jurisdictional Statement, submitted to the Supreme Court by Appellant David L. Wilkinson, and the Motion To Affirm, submitted to the Court by Appellees, further illustrates why the District Court decision should be read narrowly. The first question presented in Appellant's Jurisdictional Statement reads as follows:

> "(1) '[W]hether the first Amendment denies government any power to restrict the public [dissemination] of indecent [material on cable television] in any circumstances.' F.C.C. v. Pacifica Foundation, 438 U.S. 726, 744 (1978) (opinion of Stevens, J.)"[56]
> (brackets in original)

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56. Jurisdictional Statement at (i), Wilkinson v. Jones, 107 S.Ct. 1559 (1987).

In their Motion To Affirm, Appellees argued:

> "[T]he statute at issue and the judgment below simply do not require or justify consideration of [that] question[].[57]

And at pages 20-21 of their Motion To Affirm Appellees state:

> In an effort to persuade this Court of the importance of the issue raised on appeal, appellant not only asks the Court to abstract from this case the broadest constitutional issue raised...but to disregard the other necessarily attendant issues that make clear that this statute is infirm on narrower constitutional grounds.

By summarily affirming the Circuit Court opinion, this Court provided no indication of the rationale of the Court in affirming or of the Justices that voted to affirm. Some or all of the Justices could have concluded that the Utah statute as such was vague or overbroad, without

57. Motion to Affirm at 9, Wilkinson v. Jones.

actually deciding Appellant's broad constitutional issue as phrased in question (1) above.

As this Court stated in Mandel v. Bradley, 432 U.S. 173, 176 (1978):

> Summary actions...should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved. (emphasis supplied)

The Court in Mandel indicated that the "precedential significance" of a summary decision must be assessed in light of all the facts in that decision and that where the facts of a subsequent case are "very different," lower courts must make an "independent examination of the merits" in the new case.[58]

If this Court's summary affirmance in Wilkinson v. Jones does not foreclose either lower courts or this honorable

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58. Id., at 177.

Court itself from addressing in a future case the question of the validity of carefully constructed cable TV indecency legislation, it certainly does not foreclose the Court from now addressing the issue of whether the First Amendment denies Congress power to prohibit indecent communication in an entirely different medium--to wit, telephonic communications, and, in particular, commercial "dial-it" services. As the Court noted in its Pacifica decision:

> Each medium of expression presents special First Amendment problems.[59]

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59. Pacifica, at 748.

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that the decision of the District Court for the Central District of California holding unconstitutional the "indecency" pronibition in 47 U.S.C. 223(b) is erroneous and should be reversed. Paris v. Adult Theatre I v. Slaton, supra, reminds us that the government has a right to maintain a "Decent Society."

Dated, February 23, 1989

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